

APPENDIX B:
**EXCERPTS FROM COMPTROLLER GENERAL DECISIONS REGARDING
COMPETITIVE DISCUSSIONS**

ISSUE 1: QUESTIONING A HIGH PRICE

B-238875, Matter of: Business Information Management Corporation, July 17, 1990

DIGEST

1. Cost discussions were meaningful where record establishes that the contracting agency indicated to the high-priced offeror that its costs should be reduced, and the offeror did, in fact, lower its price proposal. Agency reasonably did not discuss technical areas where the evaluators found no technical weaknesses or deficiencies in the proposals which were included in the competitive range.

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DECISION

Business Information Management Corporation (BIMCO) protests the award of a contract to Synetics Corporation issued by the Customs Service, Department of the Treasury, under request for proposals (RFP) No. CS-90-005. BIMCO, the incumbent contractor for related services, alleges that the award is improper because the Customs Service did not conduct meaningful discussions with the firm, misapplied the cost evaluation criteria, and failed to provide a common basis for competition.

We deny the protest in part and dismiss it in part.

The RFP requested offers for a firm, fixed-unit price, indefinite quantity contract for electronic data processing services in technical areas pertaining to conceptual design, general systems design, telecommunications, hardware/software, systems evaluation and performance optimization of Customs' Large Systems. The RFP required offerors to provide loaded unit rates for eight labor categories identified in the solicitation as: program manager, senior system & designer/programmer, senior system programmer, senior systems engineer, system engineer, senior systems analyst, system programmer and technical editor. The RFP required the contractor to supply the necessary personnel, facilities and material to perform individual task orders as issued, in six areas specified in the statement of work. The contract is for a base period with three 1-year options.

The RFP provided that offers would be based on level of effort estimated at a total of 68,000 hours of direct labor for the base period and all three option periods. The RFP evaluation formula assigned a maximum of 70 points for technical merit and 30 points for price and provided that award would be made to the offeror whose proposal was most advantageous to the government, price and other factors considered.

Seven firms, including BIMCO and Synetics, submitted initial proposals and, after evaluation, three of the seven were determined to be in the competitive range. **The contracting officer determined that there were no deficiencies in any of these three proposals; therefore, discussions on cost issues only were held, after which all three offerors submitted best and final offers (BAFOs).** A price analysis and a most probable cost determination were performed on the BAFOs using a scoring formula that gave the lowest-priced, technically acceptable offer the maximum cost points, with other, higher-priced offers receiving proportionally less cost points.

Synetics received a final total score of 85 points, consisting of a technical score of 55 out of a possible 70 points, and 30 out of a possible 30 points for its \$3,590,339 BAFO price. BIMCO

received a total score of 84.44 points, 61 points for technical merit, and 23.44 points for its BAFO price of \$4,591,158. The total score for the third offeror was significantly lower than BIMCO's score. After reviewing the technical and price evaluation results, and determining that there was no meaningful difference between the BIMCO and Synetics technical proposals, the contracting officer concluded that the Synetics' proposal was most advantageous to the government. The contract was awarded to Synetics and this protest followed.

BIMCO's primary basis of protest is that the Customs Service failed to conduct meaningful discussions because the agency failed to advise BIMCO that its offer was not priced competitively, or to discuss BIMCO's direct labor rates or understanding of the labor categories, and did not inform BIMCO that the procurement had requirements which differed from the initial contract. BIMCO claims that it reasonably perceived the RFP to be a follow-on contract requiring sophisticated software development, programming, and oversight services because it had performed such work as the incumbent contractor under the prior contract. As a result, BIMCO asserts that its proposed staff consists of highly experienced individuals with unique, sophisticated and costly software development and programming abilities. BIMCO alleges that this caused its direct labor rates to be inflated with the result that its proposal was grossly overpriced. BIMCO also alleges that the RFP did not adequately define the required labor categories, an impropriety which affected BIMCO's calculation of its direct labor rates. (FN1)

According to the protester, during oral discussions with BIMCO officials, the contracting officer identified only minor weaknesses in BIMCO's cost proposal. BIMCO has provided signed statements from its employees in which they recall that the contracting officer only questioned BIMCO's general and administrative (G & A) expenses, overhead, and proposed raises for certain employees. BIMCO asserts that because the contracting officer did not discuss BIMCO's "overlapping excesses/weaknesses in its technical and cost proposals," or inform BIMCO that, unlike the predecessor contract, the current requirement called for oversight functions only, BIMCO incorrectly assumed that the contracting officer considered BIMCO's personnel to be consistent with the agency's minimum needs, and that BIMCO's direct labor rates were reasonable.

As a result, BIMCO claims that it simply reduced its G & A, decreased one proposed salary raise, lowered the rates for two unfilled positions, and slightly increased the labor rates for three of the eight positions. Conversely, in other instances, BIMCO's direct labor rates and escalation factor were slightly increased. Accordingly, BIMCO maintains that its staffing and pricing were excessive because meaningful discussions were not conducted.

The Customs Service concedes that discussions were limited to cost issues but states that the discussions encompassed BIMCO's direct labor rates. According to the contracting officer, she informed BIMCO that its proposed labor rates were too high and that its "over-all" rates, i.e., labor rates plus overhead, escalation, and profit, were not competitive. In addition, she recalls telling the firm, while discussing its labor rates, "to sharpen its pencils."

In the context of this procurement, the record shows that Customs Service held meaningful discussions with BIMCO. **Where, as here, the evaluators identified no deficiencies in the technical proposals, the contracting officer is not required to inform an offeror of areas in its technical proposal that could be improved.** The protester asserts that the contracting officer was required to discuss qualifications in "excess" of the government's needs. However, the contracting officer did not determine that BIMCO personnel were overqualified. On the contrary, while the technical evaluators did rate BIMCO's proposal highest technically (61 out of 70), it was also noted that several senior BIMCO personnel lacked college degrees but that this was compensated for by their extensive experience in large scale database systems. In our view, the record reflects that BIMCO could not simply have substituted less qualified, lower- paid

personnel, without suffering a corresponding diminution in its technical score. Thus, we find that the contracting officer had no basis to advise BIMCO that the qualifications and wages of its proposed personnel were "excessive."

Regarding the content of the cost discussions, the record contains an apparent dispute between the parties regarding the discussion of direct labor rates. As noted above, BIMCO furnished sworn statements from its employees concerning this issue. In one such statement, the affiant states "(a)t no point was any discussion held on direct labor rates-either for BIMCO personnel or subcontractors." However, the same affiant also states:

"(a)t no time do I recall (the contracting officer) giving any indication other than she was doing her standard negotiation. In fact, my feeling was that she was doing the normal get the best deal for the government job." (Emphasis in original).

The agency's written memoranda of discussions held with BIMCO indicate that prior to discussions the contracting officer identified low and high objectives for negotiation of each labor category in BIMCO's initial offer. Her post- negotiation memorandum sets forth the negotiated rates for each such category. In its BAFO, BIMCO stated that it had made "some significant adjustments." The adjustments noted all pertain to price decreases, including labor rate decreases for four of eight listed staff positions. While BIMCO insists that the contracting officer did not discuss the most substantial weakness in its cost proposal—BIMCO's "inflated" direct labor rates—the changes in its BAFO together with BIMCO's statement that the contracting officer was negotiating the "best deal for the government" support the contracting officer's position that BIMCO was advised that its pricing was not competitive. See FAA Seattle Venture, Ltd., B-234998.2, Aug. 9, 1989, 89-2 CPD P 116.

Although the record does not establish that specific, direct labor rates were discussed, it is clear that BIMCO was advised that all of its proposed costs, which consist primarily of direct labor costs, were not competitive. While BIMCO argues that it was entitled to detailed discussion regarding the excessiveness of each of its specific labor rates, we believe that the agency reasonably provided BIMCO with more general guidance concerning its high cost. In this regard, we note that the Federal Acquisition Regulation (FAR) prohibits agency disclosure to one offeror of its price standing relative to another offer during discussions, FAR s 15.610(d)(3)(ii), thus it would have been inappropriate for the contracting officer to have advised BIMCO of the level of its direct labor rates relative to its competitors' rates. **Further, the content and extent of discussions is a matter of the contracting officer's judgment based on the particular facts of the procurement.** Randtron Sys., B- 237354, Feb. 14, 1990, 90-1 CPD P 277. **There is no requirement that agencies conduct all-encompassing discussion; rather, agencies are only required to reasonably lead offerors into those areas of their proposals considered deficient within the context of the procurement.** Syscon Serv., Inc., 68 Comp.Gen. 698 (1989), 89-2 CPD P 258. **Given the totality of the record we find that the contracting officer reasonably apprised BIMCO that its cost proposal was not competitive.**

As to BIMCO's assertion that it assumed that programming responsibilities were included in this contract, based on its experience as an incumbent, the simple answer is that no such tasks were described in the statement of work, and while BIMCO may have performed such work in conjunction with initiating the system under the prior contract, there was no reasonable basis for an offeror to conclude that the current, follow-on RFP encompasses such a requirement.

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ISSUE 2: PRESENTING A POSITION ON PRICE

Comptroller General of the United States

Matter of: Racal Guardata, Inc.

File: B-245139.2

February 7, 1992

Digest

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2. Contracting agency did not engage in a prohibited auction by requesting 1 offeror to reduce its price by 10 percent and another offeror to reduce its price by 30 percent, where the price objectives were based upon a comparison of the proposed price for each piece of equipment with catalog and prior contract prices and on an allowance for desirable quantity discounts; a contracting agency may develop different negotiation price objectives based upon separate appraisals of each offeror's proposal and these objectives may be disclosed to the offeror in question as a negotiation tool for reaching an agreement as to a fair and reasonable price.

Decision

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Finally, **Racal contends that Treasury's** conduct of negotiations amounted to a prohibited auction. During negotiations, Treasury requested Racal and IRE to reduce their proposed prices. Based upon a detailed analysis of the proposals, comparing the proposed price for each piece of equipment to catalog and prior contract prices, and taking into consideration desirable quantity discounts, Treasury requested Racal to reduce its price by 10 percent, from \$1,434,500 to \$1,291,050, and IRE to reduce its price by 30 percent, from \$2,041,300 to \$1,428,910. Had the offerors complied with Treasury's request, Racal's price would have been \$137,860 lower than IRE's, which would have increased Racal's evaluation score sufficiently to move the firm in line for award. However, Racal reduced its price by only 8.9 percent, to \$1,307,100, while IRE reduced its price by 40 percent, to \$1,225,560, that is, \$81,540 lower than Racal's. As a result of its greater-than-requested price reduction, IRE received the highest evaluation score. Racal argues that requesting specific, differing price reductions from offerors was improper and that the award therefore should be overturned.

We disagree. although FAR §15.610(e) (2) prohibits auction techniques such as indicating to an offeror a price that it must meet to obtain further consideration or advising an offeror of its price standing relative to another offeror, Treasury did neither here. Instead, the agency revealed its price goal for each proposal. As we have previously held, it is not improper for a contracting agency to disclose a price objective as a negotiation tool for reaching an agreement as to a fair and reasonable price, Printz Reinigung GmbH, B241510, Feb. 8, 1991, 91-1 CPD ¶ 143; America Seating Co., B-230171.36, Aug. 31, 1989, 89-2 CPD ¶ 195, so long as the agency is not conducting direct price bidding among competing offerors. Ikard MEG. Co., 63 Comp. Gen. 239 (1984), 84-1 CPD ¶ 266. Further, an agency may develop different negotiation objectives based upon separate appraisals of each offeror's proposal, and these objectives may be disclosed to the

offeror in question as a basis for negotiation. See Professional Peer Review of Florida, Inc.; Florida Peer Review Org., Inc., B-215303.3; B-215303.4, Apr. 5, 1985, 85-1 CPD ¶ 394; Griggs and Assoc. Inc., B-205266, May 12, 1982, 82-1 CPD ¶ 458. Accordingly, we conclude that Treasury acted properly in establishing and disclosing to the offerors separate negotiation objectives based upon its analysis of each offeror's proposal.

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The protest is denied.

James F. Hinchman
General Counsel

B-245139.2

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ISSUE 3: CHALLENGING A LOW PRICE

B-239200, Matter of: Byrne Industries, Inc. , Date: August 13, 1990.

DIGEST

1. Agency's three requests for price verification of low offer, after submission of initial offers and before submission of best and final offers, were not improper, coercive, or misleading when circumstances reasonably lead the agency to question whether the offeror may have made a mistake in its offer in view of the previous prices paid for the item and the low offeror's inexperience in producing the item.
2. Protest that prices may have been disclosed to the protester's competition is denied where the allegation is primarily based on the awardee's reduction of the prices in its best and final offer to levels slightly below protester's initial prices.

DECISION

Byrne Industries, Inc. protests the award of a contract to Mine Safety Appliances Company under request for proposals (RFP) No. DAAA09-89-1294 issued by the Department of the Army for 1,246,344 C2 canisters. The canisters are replacement filters for gas masks. Byrne contends that the Army improperly induced it to increase its low prices and disclosed its prices to the awardee.

We deny the protest. (FN1)

The RFP, issued on October 18, 1989, requested offerors to furnish fixed prices for the canisters, both with and without first article testing, and for delivery on an f.o.b. destination and f.o.b.

origin basis. The RFP basically provided for award to the offeror proposing the low evaluated fixed price.

On the January 12, 1990, closing date the Army received six proposals in response to the RFP. Byrne was the apparent low offeror with unit prices, based on first article testing, of \$6.695 f.o.b. destination and \$6.595 f.o.b. origin. (FN2) According to the agency, because Byrne's price was considerably lower than the price the Army had paid in three earlier procurements and because Byrne had not previously supplied the canisters, it suspected a possible error in Byrne's bid and therefore requested verification. Byrne confirmed its prices in writing.

Byrne and the second low offeror were then separately notified that they would be subject to a preaward survey conducted by the Defense Contract Administration Services Management Area—Springfield, N.J. (DCASMA). Before the two preaward surveys were conducted, the agency issued an amendment to the solicitation involving quality inspection and testing requirements and requesting best and final offers (BAFO). (FN3) After the preaward surveys, during which Byrne again confirmed its prices, the agency issued two further amendments and extended the closing date for BAFOs to March 16. Two days prior to closing, on March 14, an Army contract specialist telephoned Byrne and advised the firm that its price was very low and should be reviewed carefully.

When it submitted its BAFO 2 days later, Byrne raised all of its prices by \$.195. (FN4) Mine Safety lowered all of its unit prices by \$.56 and became the low offeror. (FN5) On March 29, the agency awarded a contract to Mine Safety based on its low, f.o.b. destination, without first article testing, price.

Byrne argues that the Army's March 14 telephone call was improper and effectively coerced and/or misled it to raise its price because the firm had already confirmed its price twice. In support of this argument, Byrne has submitted the affidavit of its executive vice president stating that but for the March 14 telephone call, it would have lowered the prices in its BAFO as opposed to raising them. Byrne alleges that the agency probably did not have conversations of this nature with any other offeror and alleges the disparate treatment was prejudicial to it.

It is true that an agency may not consciously coerce or mislead an offeror into raising its price. See *Eagle Technology, Inc.*, B-236255, Nov. 16, 1989, 89-2 CPD P 468. **However, our review of the record does not indicate that the agency had any such motive.**

The Army asserts that its requests to Byrne were consistent with regulatory mistake in proposal procedures. According to the Army, its concerns were justified by Byrne's extremely low prices and its inexperience in producing the item. The record shows that in prior procurements the lowest price the agency paid was \$6.99 per canister, significantly higher than Byrne's prices of \$6.595 and \$6.695. Additionally, an earlier contractor had gone bankrupt producing the canisters. We think these circumstances show that the agency's expressions of concern about Byrne's prices were reasonable particularly in light of the fact that Byrne had never furnished the canisters before. In this regard, although there may be, as contended by Byrne, no requirement to repeatedly request price verification in case of a suspected mistake, there is also no limitation on such contacts where the agency still has legitimate concerns about the low price. See *Pamfilis Painting, Inc.*, B-237968, Apr. 3, 1990, 90-1 CPD P 355. Thus, we do not find these discussions improperly coercive or misleading.

Byrne also maintains that by repeatedly questioning its "low" prices, the contract specialist in effect, improperly informed Byrne of its price standing relative to other offerors and caused Byrne to increase its prices. **Since the Army's request to Byrne that it review its prices in accordance with Federal Acquisition Regulation (FAR) §15.607 (FAC 84-16) because a**

mistake in the proposed prices were suspected, we do not believe that they constituted violations of the general prohibition against informing offerors of their relative price standing. See FAR s 15.610(d)(3) (FAC 84-16).

Moreover, we do not find these price verification requests represented improper disparate treatment of the offerors. The Army made a similar request for price verification from the firm that was the second low offeror initially because its prices were only slightly higher than Byrne's and significantly lower than previous prices paid for the item. The Army did not ask Mine Safety to confirm its initial prices, as it did the two low offerors, because the prices of Mine Safety, a previous supplier, were within the range of prices paid previously by the Army. Finally, although the agency did not request Mine Safety to verify its BAFO prices prior to award, the contracting officer states that he had no reason to seek verification in view of the close price competition and since Mine Safety is a current producer of the item.

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The protest is denied.

James F. Hinchman General Counsel